# *RE* KHOR HOI CHOY KHOR HOI CHOY v. MENTERI DALAM NEGERI MALAYSIA & ORS.

[O.Cr. J. (Mohamed Dzaiddin J.) September 17, 18 & 28, 1985]

[Penang – Criminal Application No. 2 of 1985]

*Administrative Law – Habeas corpus – Minister's order of detention – Advisory Board's finding and report – Validity – Whether detention lawful – Dangerous Drugs (Special Preventive Measures) Act, 1985, ss. 6, 7, 9, 10, 11 & 22 – Emergency (Public Order and Prevention of Crimes) Ordinance, 1969, ss. 4 & 7 – Public Order and Prevention of Crime (Procedure) Rules, 1972 – Federal Constitution, art. 43A(2), 149 & 151(1).*

The applicant was detained for one year from July 15, 1985 by order of the Minister of Home Affairs under the Dangerous Drugs (Special Preventive Measures) Act 1985. He applies for an order of *habeas corpus* for his release. He had earlier been detained for two years from July 16, 1983 to July 15, 1985 under section 4(1) of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969. On July 11, 1985, the Advisory Board reviewed the applicant's previous order of detention under section 4(1) of the Ordinance. The Board was of the opinion that his detention be extended for a further period of one year. It reported to the Minister, who acted on its finding accordingly. The main question for decision is whether the Advisory Board has power under section 11(1) of the Act to review section 4(1) order of the Ordinance.

**Held**, allowing the application: (1) there are two prerequisites or conditions precedent which must be satisfied before the Advisory Board can commence to review under section 11(1) of the Act. First, there must be an existing order made by the Minister under section 6 or section 7. On July 11, 1985 there was no such detention order. Second, the review must be conducted not less than three months before the expiration of the existing order. Both conditions were not satisfied by the Board. The review by the Board and its report were therefore invalid. What was fatal was the fact that the Minister acted on the Board's report which was invalid and *ultra vires* section 11(1) of the Act;

(2) it is wrong for the Advisory Board to follow or adopt the Public Order and Prevention of Crime (Procedure) Rules, 1972, made under the Ordinance. In view of the absence of any rules or regulations made by the Yang di-Pertuan Agong under section 9(3) of the Act, any review convened under section 11(1) where representations under section 9 have been made was premature and improper;

(3) as the continued detention of the applicant would be unlawful, he must be set at liberty.

*Cases referred to:*

(1) *Re Tan Boon Liat @ Allen & Anor. et. el.* [1977] 2 M.L.J. 108.
(2) *Subramaniam* v. *Menteri Hal Ehwal Dalam Negeri* [1977] 1 M.L.J. 82.
(3) *Abdul Karim* v. *State of West Bengal* A.I.R. 1969 S.C. 1028.
(4) *N.N. Majumdar* v. *N.M. Bardhan* A.I.R. 1959 Calcutta 219.
(5) *The Reverend Thomas Pelham Dale's Case* (1881) 6 Q.B.D. 376.
(6) *Musa bin Salleh* v. *Public Prosecutor* [1973] 1 M.L.J. 167.

[The following cases were also cited in argument: *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 M.L.J. 129; *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons* [1976] 2 M.L.J. 156; *Yeap Hock Seng @ Ah Seng* v. *Minister of Home Affairs* [1975] 2 M.L.J. 279; *Che Su binti Shafie* v. *Superintendent of Prisons, Pulau Jerejak, Penang* [1974] 2 M.L.J. 194.]

CRIMINAL APPLICATION.

*Gooi Hock Seng* (*Peter Huang* with him) for the applicant.

*Cik Zaleha Zahari* (Senior Federal Counsel) for the respondents.

*Cur. Adv. Vult.*

**Mohamed Dzaiddin J.**: This is an application for an order of *habeas corpus* by Khor Hoi Choy @ Khaw Hai Chai, the applicant who is being detained at Pusat Pemulihan Akhlak, Pulau Jerjak under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) for a period of one year from July 15, 1985 by an Order of the Minister of Home Affairs dated July 15, 1985 ("the said Order").

The application is supported by the affidavit of Madam Tai Lei Nai, the wife of the applicant affirmed on July 22, 1985. In paragraph 8, she sets out nine grounds for challenging the validity of the said Order. However, at the hearing of the application, Mr. Gooi, counsel for the applicant, consolidated the grounds and submitted under five major grounds.

The following facts are not disputed:

1) The applicant was detained for a period of 2 years from July 16, 1983 to July 15, 1985 under the detention order dated July 6, 1983 made in pursuance of section 4(1) of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969 ("the Ordinance");

2) The applicant was detained at Pusat Pemulihan Akhlak, Muar from July 17, 1983 to March 12, 1984 and at Pusat Pemulihan Akhlak Pulau Jerjak, Penang from March 12, 1984 until July 15, 1985;

3) On July 11, 1985, the Advisory Board reviewed the applicant's previous order of detention made under section 4(1) of the Ordinance. The Board heard representation made by the applicant but was of the opinion that his detention be extended for a further period of 1 year on the same grounds as those on which the applicant's detention order was originally made (section 4(1) Order). The Board, on the same day, reported to the Minister its finding;

4) On July 15, 1985 the Deputy Minister of Home Affairs received a report from the Advisory Board pursuant to section 11(4) of the Act regarding the applicant. He was satisfied with the opinion in the report of the Advisory Board and accordingly directed the applicant's detention under the Ordinance be extended for a further period of 1 year from July 15, 1985;

5) The applicant was removed from Pulau Jerjak to Cawangan Anti Dadah at Georgetown on July 15, 1985 and was detained there until July 18, 1985 when he was served with the said Order by two officers of the Cawangan Anti Dadah Penang. He was then taken back to Pulau Jerjak on the same day.

From submission of counsel for the applicant it appears to me that the crunch of his contention is that the Advisory Board has no power under section 11(1) of the Act to review the section 4(1) Order of the Ordinance. It is not disputed that in the present case the review which was held on July 11, 1985 was in respect of the section 4(1) Order under the Ordinance. I refer to the affidavit of the Chairman of the Advisory Board affirmed on August 24, 1985 (Encl. 11). He stated that the Advisory Board was empowered to review every order of detention made under section 4(1) of the Ordinance *and thereafter* (the emphasis is mine) under section 11(4) of the Act for the Board to submit its report to the Minister stating the opinion whether the detention order should be extended pursuant to section 6(5) of the Act. The affidavit of En. Radzi bin Sheikh Ahmad, the Deputy Minister of Home Affairs (Encl. 12) confirmed this. He stated that on July 15, 1985 he received a report from the Advisory Board pursuant to section 11(4) of the Act in respect of the applicant.

Section 11 of the Act reads as follows:

"11.(1) Every order or direction made or given by the Minister under the subsection (1), (3) or (5) of section 6 or under section 7 shall, so long as it remains in force and whether or not representations under section 9 have been made, be reviewed by an Advisory Board not earlier than twelve months from the date of such order or direction and in any case not later than three months before the expiration of the period mentioned in such order or direction:

Provided that the Minister may, at any time during the period of detention or restriction imposed by such order or direction, direct the Advisory Board to review the case.

(2) The Advisory Board shall, on completing every review under this section, submit to the Minister, before the expiration of the period of detention or restriction, a written report of every such review.

(3) (Not relevant.)

(4) Where the Advisory Board has reported that in its opinion the detention or restriction should continue or be extended, the Minister may continue or extend the detention or restriction of the person concerned."

Subsection (1) refers to an order made by the Minister under subsections (1), (3), (5) of section 6 and under section 7 of the Act. These sections relate to a detention order, a restriction order, an extension detention order and suspension of detention order. So long as the Order is in force the Advisory Board can review the said Order not earlier than twelve months from the date of the Order and not later than three months before its expiry. Provided of course, the Minister may direct the Advisory Board at any time during detention to review the case.

Reverting to the affidavit of the Chairman of the Advisory Board (Encl. 11) it is clear that he acted to review the order under section 7(1) of the Ordinance and on completion of the review he submitted his report to the Minister under section 11(4) of the Act. He cannot have acted under section 11(1) of the Act because under the subsection, the review must be held not earlier than twelve months and not later than three months before the expiration of the existing order, unless such review was directed by the Minister. There was nothing stated in any of the two affidavits (Encl. 11 and 12) that the Minister gave direction to the Advisory Board to review the case. But under section 7 of the Ordinance, the Chairman has a discretion to review the detention order from time to time so long as the order remains in force. From these, I am forced to conclude that the Advisory Board has acted contrary to the intention of section 11(1) of the Act by reviewing the existing Detention Order under section 7 of the

Ordinance and proceeded to report to the Minister its finding under section 11(1) of the Act.

Cik Zaleha, for the respondent, contended that section 11(1) is an additional review and its provision is to be read not in isolation but must be considered, to use her own words "at the source" *i.e.* the Advisory Board could derive its power of review from section 7 of the Ordinance. And under section 7(1) of the Ordinance the Advisory Board may at the discretion of the Chairman, from time to time review every Detention Order so long as it shall remain in force. I think it is on the strength of section 6(5) which influenced Cik Zaleha to urge the Court to import section 7 of the Ordinance when construing section 11(1) of the Act. In my opinion, I do not think the court can do so. The mere incorporation by reference of a section in another Ordinance or Act does not extend the provision of the section in the Ordinance to the Act. The Act must be explicit on this. The Act requires strict interpretation and it is always the duty of the Court to interpret the law according to the established principles of construction. This Act which came into force on May 30, 1985 is intended to provide for the preventive detention of persons associated with any activity involving in trafficking of dangerous drugs. It was promulgated pursuant to Article 149 of the Constitution and it certainly affects the fundamental liberty of the subject. It is of utmost importance that there should be strict compliance with the requirements of the Act (see: *Re Tan Boon Liat & Allen & Anor. et.el.*[1])

In my opinion, under section 11(1) of the Act, the Advisory Board can only act under an order made by the Minister under section 6(1), (3) or (5) or under section 7 of the Act. In short, there is thus a power given by this section 11(1) to review only every order of the Minister made under section 6 or section 7. In the present case, was there an order made either under section 6 or section 7 to enable the Advisory Board to conduct its review pursuant to section 11(1)? The short answer is 'no'. In fact there are two prerequisites or conditions precedent which the Advisory Board has to fulfil before commencing to review under section 11(1) of the Act. First, there must be an existing order made by the Minister either under section 6 or section 7. It is not disputed that on July 11, 1985 when the Advisory Board conducted its enquiry there was no such detention order made pursuant to the above sections. Secondly, the review must be conducted not less than three months before the expiration of the existing order. Both conditions were not satisfied by the Advisory Board. Therefore, for these reasons, the review by the Advisory Board under section 11(1) and its consequential report under section 11(4) are invalid.

With regard to section 6(5) of the Act, it is clear that the Deputy Minister of Home Affairs issued the Order and the allegation of facts (Exh. RSA(1) and RSA(2) in Encl. 12) after careful consideration of the report of the Advisory Board. Accordingly, he directed that the duration of the Detention Order made under section 4(1) of the Ordinance be extended for a further period of one year from July 15, 1985. Insofar as the Order is concerned, I agree that the Deputy Minister has acted in accordance with the subsection. However, what is fatal was the fact that he acted on the report of the Advisory Board which for reasons I have stated earlier is invalid and *ultra vires* section 11(1) of the Act.

The second ground concerns the interpretation of section 9(3) of the Act. It was contended by the applicant that the Advisory Board has prematurely and improperly convened a review under section 11(1) of the Act when no rules under section 9(3) have been made by the Yang di-Pertuan Agong. Here, Cik Zaleha conceded that the Yang di-Pertuan Agong has not made any rules as to the manner in which representation may be made and for regulating the procedure of the Advisory Board. However, she contended that until the Yang di-Pertuan Agong makes the rules, section 22(3) of the Act applies. Section 22(1) says the Minister may make regulations to carry out the purposes of this Act. Sub-section (2) provides the type of regulations which the Minister can make. Then, sub-section (3) states as follows:

> "All rules and regulations made, and directions given, under the Emergency (Public Order and Prevention of Crime) Ordinance 1969, shall be deemed to have been made or given under this Act shall accordingly have effect, amended if necessary under this section, for the purposes of this Act until such time as the rules, regulations or directions are revoked."

There is clearly something to be said about the specific powers of the Yang di-Pertuan Agong under section 9(3) and the general powers of the Minister to make regulations under section 22 of the Act. From my reading of section 9, it is clear that the said section enacts the mandatory provisions of Article 151(1) of the Constitution. It is for this reason that subsection (3) stipulates that the Yang di-Pertuan Agong and not the Minister who may make rules relating to the representation

and for regulating the procedure of the Advisory Board with regard to such representation. I should of course add here that subsection (3) speaks of rules for regulating the procedure of the Advisory Board which I construe to mean a specific procedure pertaining to the representation to the Advisory Board under section 9 of the Act. It follows that under Article 151(1)(b) and enacted in section 10 of the Act that the representation and the recommendation of the Advisory Board shall be considered by the Yang di-Pertuan Agong. Under the Act, any representation to the Advisory Board must follow the procedure to be set out under subsection (3). It is wrong for the Advisory Board to follow or adopt the Public Order and Prevention of Crime (Procedure) Rules, 1972 which were made under the Ordinance. In the circumstances, in view of the absence of any rules or regulations made by the Yang di-Pertuan Agong under section 9(3) of the Act, any review convened under section 11(1) where representations under section 9 have been made was premature and improper.

The third ground again relates to the right of representation as guaranteed under Article 151(1)(a) of the Constitution. It was submitted by counsel that the Extension Detention Order issued by the Deputy Minister under section 6(5)(a) was made without the applicant having had an opportunity of making a representation.

The affidavit of the Chairman (Encl. 11) stated that before the review took place on July 11, the applicant was served with a notice of hearing and was informed that the Advisory Board would be prepared to hear any representation and that he would be allowed to appear in person or represented by counsel. During the hearing the Advisory Board heard his representation which lasted not less than 30 minutes and he was given a reasonable opportunity to make his representation. Here, it is quite obvious the Advisory Board followed the procedure laid down in Public Order and Prevention of Crime (Procedure) Rules 1972. The quarrel of the applicant is that an order of the Minister made in pursuance of section 6(5)(a) does not give the applicant the same right of representation had an order been made under section 6(5)(b) or (c). This, according to counsel is contrary to the spirit of Article 151(1)(a) of the Constitution. Section 6(5) reads as follows:

"The Minister may, where the Advisory Board has reported under subsection (4) of section 11 that in its opinion the detention or restriction should be extended, direct that the duration of any detention order or restriction order made under this Part or any detention order or restriction order made under section 4 or 4A respectively of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 in respect of a person associated with any activity relating to or involving the trafficking of dangerous drugs under the Dangerous Drugs Act 1952 be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not extending two years at a time, as he may specify, either –

(a) on the same grounds as those on which the order was originally made;

(b) on grounds different from those on which the order was originally made; or

(c) partly on the same grounds and partly on different grounds:

Provided that if a detention order is extended on different grounds or partly on different grounds, the person to whom it relates shall have the same rights under section 9 as if the order extended as aforesaid were a fresh order."

Clearly, the subsection makes a distinction between the extension order made on the same grounds on which the order was originally made and on different grounds or partly on same grounds and partly on different grounds. Hence, where the Order is made under section 6(5)(b) or (c), the detainee shall have the right to make representations to the Advisory Board under section 9. This is done in order to comply with Article 151(1)(a) of the Constitution because the Extension Order was based on grounds which were different from those on which he was originally detained or partly same grounds and partly different grounds. Under the circumstances, he must be given the right to make representations under section 9. On the other hand, I do not think it was necessary for a second representation when the Extension Order was made on the same grounds as those on which he was originally detained. Any omission in the Act to provide similar representation as those under section 6(5)(b) or (c) does not violate Article 151(1) of the Constitution. I have also considered *Subramaniam* v. *Menteri Hal Ehwal Dalam Negeri*[2] and *Abdul Karim* v. *State of West Bengal.*[3] Although these cases refer to the right of representations as guaranteed under the Constitution, I am of the view that they are not relevant in this particular issue. For the above reasons, I find no merit in the applicant's contention.

On the fourth ground, counsel submitted that the said Order was invalid when it was served on the applicant on July 18, 1985. Alternatively, he submitted that the applicant's continued detention at the office of Cawangan Anti Dadah George-

town from July 15, until July 18, 1985 was unlawful and illegal by reasons of the same grounds. He contended that the said Order became operative not on the date when the Order was made and signed by the Deputy Minister on July 15, 1985 but on the date of service of the said order on the applicant on July 18, 1985. Counsel relied on an Indian case of *N.N. Majumdar* v. *N.M. Bardhan*[4] where the learned Judge at page 221 stated as follows:

"In my opinion the position may be summed up as follows:

(1) An order may be taken to be made on the date it came into existence if the nature of the order is such that it is not necessary to communicate it to anyone. It is easy to see that only very few orders will satisfy this test.

(2) If an order is made which affects the rights of a person, then the order must be communicated to such person in order to be complete and effective. The date of the order is the date when it is made known to the affected party."

There are exceptions to the above principle. I need not go into them nor into the facts of the case. Suffice it to say that the facts are entirely different from the present case. However on the facts of the present case, it is not disputed that on July 11, 1985 the Advisory Board informed the applicant that the Board proposed to make a report to the Minister recommending that his detention be further extended for another one year. The applicant must have been aware at the time that his Detention Order under section 4(1) of the Ordinance was to expire on July 15. I am satisfied that the gist or content of the Order was communicated to him on July 11, 1985 by the Advisory Board. I agree with Cik Zaleha that the irregularity here relates to the service of the Order which does not render the Order invalid. This could be attributed to some miscommunication. However, the said Order was served within a reasonable time. In the circumstances I find that the said Order valid and applicant's detention at Cawangan Anti Dadah, Georgetown lawful.

Lastly, it was the contention of the applicant that the said Order is invalid because it was signed by the Deputy Minister of Home Affairs who was not authorised by the Minister to do so. Again, I find no merit in this contention. In the Act, "Minister" means the Minister charged with responsibility for internal security. The Act does not say that Minister includes the Deputy Minister. However, in my opinion, it is sufficiently clear that under the amended Article 43A of the Constitution, the Deputy Minister has the power of the Minister. Article 43A(2) says that the Deputy Ministers shall assist Ministers in the discharge of their duties and functions and for such purposes shall have all the powers of the Ministers.

Let me conclude by quoting a passage in *The Reverend Thomas Pelham Dale's Case*[5] where Brett L.J. observed at page 461 as follows:

"Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

In our Courts, the then Federal Court in *Musa bin Salleh* v. *Public Prosecutor*[6] in holding a detention order valid made it clear that when in doubt about the validity of a detention or restriction order it should always be resolved in favour of the accused. In *Re Tan Boon Liat @ Allen & Anor. et. el. (supra),* Lee Hun Hoe C.J. (Borneo) stated at page 113:

"Further, preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 186. Rigby J. said to the effect that where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith."

In the present case, for reasons which I have stated under the first and second grounds I must allow this application as the continued detention of the applicant would be unlawful. Accordingly, I make an order that the applicant shall be set at liberty.

*Application allowed.*

Solicitors: *Shan & Gooi.*